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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CARIENE CADENA; ANDREW GONZALES,

Plaintiffs,

vs.

CUSTOMER CONNEXX LLC; ARCA INC.,

Defendants.

Case No.: 2:18-cv-233- APG-DJA

**DEFENDANT’S MOTION FOR
DECERTIFICATION AND SUPPORTING
MEMORANDUM**

I. INTRODUCTION

Plaintiffs allege they are owed overtime wages for time spent booting up and down their computers and other activities at the start and end of their shift. Their FLSA claims were conditionally certified under a lenient, pre-discovery standard. Now, post-discovery, the Court closely scrutinizes whether Plaintiffs are “similarly situated.” The developed record shows that Plaintiffs were not subject to any uniform policy that violated the FLSA. To the contrary, there is voluminous evidence, including testimony from most Plaintiffs, that their employer prohibited off-the-clock work and had robust procedures to ensure that employees were paid fully. Further, with respect to the dispositive issues, there are serious factual differences among Plaintiffs. Under these circumstances, Plaintiffs cannot satisfy the stricter standard and decertification is proper.

II. BACKGROUND

A. Factual Background

Customer Connexx LLC (“Connexx”) operates a call center in Las Vegas (the “Call Center”) that performs customer service and scheduling for an appliance recycling business. ECF No. 25-22, Kamaka Decl. ¶3. Since November 2016, Connexx has employed a variety of hourly employees at the Call Center, including in-bound and out-bound customer service representatives or “call center agents” who spend their work time on the phone providing customer service and scheduling for customers, “leads” who supervise call center agents, quality assurance or “QA” agents who monitor agents’ calls, dispatch employees who coordinate transportation services, information technology staff, and order management staff.¹ Different types of employees use different computer programs to do their jobs.² Hourly employees usually clock in and out using a computer program; they used ADP from November 2016 to June 2017 and PayCom from June 2017 to present.³ Kamaka Decl. ¶6. Connexx requires hourly employees to record all hours worked and prohibits working “off the clock.” *Id.* ¶4. These policies are communicated to employees verbally and in writing. *Id.* ¶5. As detailed herein, practically every Call Center employee in this case has testified they were aware of these policies, instructed by their supervisors to comply with them, did comply with them, and could use various measures to correct their time entries if needed.

B. Procedural History

This case was filed on January 3, 2018. ECF No. 1-1. The original Named Plaintiff, Danielle Curley (“Curley”), alleged she had not been paid adequately for time spent booting up

¹ See Exhibit A, “Kamaka Dep.” (10/16/19) at 14-15, 30, 39-41; Exhibit B, “Curley Dep.” at 36-40; Exhibit C, “Cummings Dep.” at 21-22; Exhibit D, “Alford Dep.” at 13, 16; Exhibit E, “Schavers Dep.” at 20, 66, 92.

² Kamaka Dep. at 35-36, 38, 41-42; Exhibit F, “Saxton Dep.” at 32; Curley Dep. at 57.

³ One Plaintiff testified he could clock in using an app on his cell phone. Schavers Dep. at 49.

1 and booting down her computer and related activities at the Call Center. *Id.* ¶¶15-16. She alleged
 2 that Defendants violated the Fair Labor Standards Act (“FLSA”), Nevada statutes, the Nevada
 3 Constitution, and Nevada law on breach of contract. *Id.* ¶¶25-60. Curley sought to bring this suit
 4 on behalf of herself and other hourly employees, as an opt-in collective action under the Fair Labor
 5 Standards Act (“FLSA”) and as an opt-out class action under Rule 23. *Id.* ¶¶22-23.

7 On February 5, 2019, Curley moved for conditional certification of her FLSA claims. ECF
 8 No. 19. On May 13, 2019, the Court applied the “lenient” conditional certification standard,
 9 granted the motion, and authorized notice to be sent to current and former hourly employees who
 10 worked at the Call Center. ECF No. 28 at 5, 10. The Court relied on Curley’s declarations and
 11 declined to give weight to Defendants’ declarations because Curley had not yet conducted
 12 discovery. *Id.* at 6-7. Notices and consent forms were sent to 195 potential collective members on
 13 June 5, 2019. ECF Nos. 30; 37-1 ¶¶6-9. Very few joined the case.⁴ Plaintiffs’ counsel filed 18
 14 consent forms on September 12, 2019, and two more consent forms in January 2020. ECF Nos.
 15 33-1, 43, 47. Curley stopped communicating with her counsel, and, the Court granted leave for
 16 Plaintiffs to substitute Cariene Cadena and Andrew Gonzales (hereinafter “Named Plaintiffs”) in
 17 an Amended Complaint. ECF No. 45. During discovery, three Opt-in Plaintiffs failed to respond
 18 to a Court Order and were dismissed with prejudice. ECF Nos. 70, 71. Another withdrew her
 19 consent form. ECF No. 62. Discovery closed on September 25, 2020. ECF No. 69. Herein,
 20 Defendants refer to the fifteen remaining employees who filed consent forms as the “Opt-in
 21 Plaintiffs,”⁵ and refer to the Named Plaintiffs and Opt-in Plaintiffs collectively as “Plaintiffs.”

26 ⁴ A low response rate may indicate there was no uniform practice violating the FLSA. *Smith v. T-Mobile USA, Inc.*, 2007 U.S. Dist. LEXIS 60729, at *18-20 (C.D. Cal. Aug. 15, 2007).

27 ⁵ This includes: Donna Alford, Brandon Cadena, Judith Cummings, Danielle Curley, Clarissa Dix,
 28 Diana Giraldo, Kevin Kinyon, Kenya Mills, Richard Ortiz, Krystal Paynter, Dawn Pratt, Rossalind Saxton, Nathan Schavers, Marguerite Simon, and Steven Somodi.

III. LEGAL STANDARD

There is a two-step certification process in FLSA collective actions. At preliminary certification, also known as “conditional” certification, the court is “focused on a review of the pleadings” and applies a “lenient” standard. *Campbell v. City of L.A.*, 903 F.3d 1090, 1109 (9th Cir. 2018). Preliminary certification “does not produce a class with an independent legal status or join additional parties to the action.” *Delara v. Diamond Resorts Int’l*, 2020 U.S. Dist. LEXIS 75803, at *4 (D. Nev. Apr. 30, 2020) (quoting *Campbell*, 903 F.3d at 1101). “The sole consequence of a successful motion for preliminary certification is the sending of court-approved written notice to workers who may wish to join the litigation.” *Id.* After the close of discovery, “defendant may instigate the second step of the certification process by moving for ‘decertification.’” *Id.* at * 5 (quoting *Campbell*, 903 F.3d at 1109). “If the motion for decertification is granted, the result is a negative adjudication of the party plaintiffs’ right to proceed in a collective,” “opt-in plaintiffs are dismissed without prejudice, ... and the original plaintiff is left to proceed alone.” *Id.*

At decertification, the court will “take a more exacting look at the plaintiffs’ allegations and the record.” *Id.* at 1109. The central inquiry is whether the named plaintiffs and opt-in plaintiffs are “similarly situated.” *Delara*, 2020 U.S. Dist. LEXIS 75803. To meet this standard, “party plaintiffs must be alike with regard to some *material* aspect of their litigation.” *Campbell*, 903 F.3d at 1114 (emphasis original). They must be “alike in ways that matter to the disposition of their FLSA claims.” *Id.* Similarities and dissimilarities in other respects are irrelevant. *Id.* “[W]hat matters is not just *any* similarity between party plaintiffs, but a legal or factual similarity material to the resolution of the party plaintiffs’ claims, in the sense of having the potential to advance these claims, collectively, to some resolution.” *Id.* at 1115 (emphasis original). And even if the plaintiffs are similarly situated, decertification is proper if, “as a practical matter,” it would be infeasible to

1 conduct a trial of the plaintiffs' claims on a collective basis. *Id.* at 1115-16. "Because of its purpose
 2 and timing, decertification can resemble a motion for partial summary judgment on the 'similarly
 3 situated' question, and may be combined with cross-motions for summary judgment." *Id.* at 1109.
 4 "At this point, the district court has a much thicker record than it had at the [preliminary
 5 certification] stage, so, as with a post-discovery dispositive motion, the plaintiff bears a heavier
 6 burden." *Id.* at 1117-18 (quote omitted). Plaintiffs must provide "substantial evidence" that they
 7 are similarly situated; otherwise, their claims must be decertified. *Id.*

9 IV. ARGUMENT

10 Plaintiffs' collective action should be decertified because they cannot satisfy the heavier
 11 burden of proving they are similarly situated with substantial evidence. Plaintiffs are not similarly
 12 situated with respect to the *material* issues that are dispositive of their FLSA claims. Here, the
 13 main dispositive issues are (1) whether the pre- and post-shift activities at issue are "work" which
 14 depends on whether Defendants had knowledge and required them to perform the activities off the
 15 clock;⁶ and (2) whether time spent on the activities was "*de minimis*", which depends on (a) "the
 16 amount of daily time" spent on the activities, (b) the regularity or irregularity of the time spent on
 17 the activities, and (c) the practical and administrative difficulty of recording the time.⁷ Here,
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21 ⁶ See *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) ("where an
 22 employer has no knowledge that an employee is engaging in overtime work and that employee
 23 fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the
 24 overtime work, the employer's failure to pay for the overtime hours is not a violation of § 207.");
 25 *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 876 (6th Cir. 2012) ("if an employer
 26 establishes a reasonable process for an employee to report uncompensated work time the employer
 27 is not liable for non-payment if the employee fails to follow the established process."); *Waine-
 28 Golston v. Time Warner Entm't-Advance*, 2013 U.S. Dist. LEXIS 43899, at *11 (S.D. Cal. Mar.
 27, 2013) (granting summary judgment on FLSA claim because there was no evidence that
 Plaintiffs were required to load computer programs prior to clocking in).

⁷ *Lindow v. U.S.*, 738 F.2d 1057, 1062-63 (9th Cir. 1984); see also *Waine-Golston*, 2013 U.S. Dist.
 LEXIS 43899, at *18 (concluding that time spent booting up and logging in was *de minimis*).

1 Plaintiffs are not similarly situated on these issues. Their testimony has been inconsistent and
 2 contrary to the allegations in the Amended Complaint. Connexx prohibited off-the-clock work,
 3 and any deviations from that policy by Plaintiffs involve individualized evidence. Their claims are
 4 not susceptible to collective proof.

5
 6 **A. Plaintiffs Are Not Similarly Situated With Respect to their Off-the-Clock Claims**
 7 **Because Connexx Prohibited Off-the-Clock Work.**

8 Connexx requires non-exempt employees to record all hours worked and prohibits
 9 employees from working “off the clock.” This is both the official policy⁸ and the actual practice
 10 at the Call Center. Numerous hourly employees at the Call Center have testified that they were
 11 aware of this policy and instructed by their supervisors to follow this policy.⁹

12 Likewise, Plaintiffs themselves testified they were required to record all of their work time
 13 and were instructed by their supervisors to do so. For example, Donna Alford and roughly 45 other
 14 employees attended a new employee orientation and were told they needed to be clocked in
 15 whenever working. Alford Dep. at 22-24. Alford understood the timekeeping policies in the
 16 handbook; each employee was responsible for recording their time; and her lead would remind her
 17 that she must be clocked in whenever working. *Id.* at 25, 27-30; *see also* Cummings Dep. at 35-36

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 21 ⁸ Connexx’s policies state employees “should not start work unless they have properly clocked in”
 22 and “an employee is not allowed to work for the company off the clock.” Exhibit P, Excerpts of
 23 2016 Handbook; Exhibit Q, Excerpts of 2017 Employee Handbook; Kamaka Dec. ¶4.

24 ⁹ *See* ECF No. 25-1, “Dalupan Dec.” ¶9 (“I am aware that Customer Connexx company policy
 25 requires hourly employees including myself, to record all hours worked honestly and accurately.”);
 26 ECF No. 25-4, “I. Gomez Dec.” ¶9 (“When I started working with Customer Connexx...my
 27 manager...instructed me that I must clock in before I start working...and that I was not to perform
 28 any work after I clocked out.”); ECF No. 25-2, “Gatlin Dec.” ¶9; ECF No. 25-3, “Godoy Dec.”
 ¶9; ECF No. 25-5, “J. Gomez Dec.” ¶6; ECF No. 25-6, “Guizar Dec.” ¶6; ECF No. 25-7, “Guzman
 Dec.” ¶9; ECF No. 25-8, “Howze Dec.” ¶8; ECF No. 25-9, “McCarron Dec.” ¶9; ECF No. 25-
 10, “Monge Dec.” ¶10; ECF No. 25-11, “Poole Dec.” ¶8; ECF No. 25-12, “Pryor Dec.” ¶8; ECF
 No. 25-13, “Reneau Dec.” ¶9; ECF No. 25-14, “Roman Dec.” ¶8; ECF No. 25-15, “Smith Dec.”
 ¶8; ECF No. 25-16, “Tuilaepa Dec.” ¶8; ECF No. 25-17, “Wilcox Dec.” ¶8; ECF No. 25-
 18, “Wilkerson Dec.” ¶8; ECF No. 25-19, “Williams Dec.” ¶8.

1 (understood employees were not allowed to work off the clock; supervisors told her she needed to
2 be on the clock while working); Schavers Dep. at 34-36 (managers instructed employees they
3 “should be clocked in at the time that we should start working;” it was a violation of policy to start
4 work prior to clocking in); Curley Dep. at 95 (understood she was responsible for accurately
5 reporting all hours worked); Exhibit G, “Dix Dep.” at 59 (Connex required employees to record
6 all work hours accurately); Exhibit H “Giraldo Dep.” at 53, 65-66 (knew she was responsible for
7 keeping accurate time records and not allowed to work off the clock; supervisors told her this);
8 Saxton Dep. at 38-39, 48 (it was common knowledge at the Call Center that employees needed to
9 clock in first thing when they arrived; she never observed her subordinates working off the clock).

12 To the extent any Plaintiffs were required to work off the clock, it was in violation of
13 company policy and their claims depend on individual evidence that is contrary to the testimony
14 of the vast majority of employees. For example, Kenya Mills testified she knew Connex’s policy
15 required her to be clocked in before she started working and off-the-clock work was prohibited,
16 but she violated policy anyway. Exhibit I, “Mills Dep.” at 27-28. She violated the policy even
17 though the Call Center Director and another supervisor told her to record all her time and be
18 clocked in whenever working. *Id.* at 30-31. In fact, “that was something they, you know, reiterated
19 all the time. Every day to everybody.” *Id.* Unlike other Plaintiffs and employees, Mills initially
20 testified that a couple leads, including co-Plaintiff Danielle Curley, told her to start working before
21 she clocked in. *Id.* at 31-34. She later backtracked and testified that no one encouraged her to work
22 off the clock or told her to do so, but that she subjectively felt it was expected because “we were
23 there to start a call center from the ground up” and “serve our clients by all means necessary.” *Id.*
24 So, to the extent Mills violated the policy, she did so for personal reasons, and her inconsistencies
25 create individual credibility issues. She is not similarly situated to any other Plaintiffs.
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1 In a similar collective action alleging unpaid pre- and post-shift work despite a widely
2 disseminated policy prohibiting off-the-clock work, the Ninth Circuit affirmed decertification.
3 *Campbell*, 903 F.3d at 1102, 1121. In *Campbell*, the police officer plaintiffs were “subject to a
4 written, FLSA-compliant policy prohibiting off-the-clock work,” and were “required to report all
5 overtime accurately.” *Id.* at 1102. The policy was “widely known among the Officers.” *Id.* The
6 officers, however, contended that “the Department follows an unwritten policy that dissuades, and
7 as a practical matter prevents, accurate time reporting.” *Id.* Reviewing de novo, the Ninth Circuit
8 held that the officers’ failure to prove a “Department-wide policy” was critical. *Id.* at 1120.
9 Although some officers’ testimony was “credible evidence of instances of unpaid overtime,” the
10 officers’ testimony was insufficient to establish “a uniform practice” and at most showed “variable
11 practices variably applied.” *Id.* at 1120-21. There was no evidence of “a uniform policy against
12 reporting small amounts of overtime,” and “no evidence to suggest that the declarants’ vaguely
13 reported experiences are in fact representative of the experiences of the party plaintiffs
14 Department-wide.” *Id.* at 1120. Considering the widely disseminated policy, the defendant’s
15 evidence of FLSA compliance, and the officers’ lack of proof of a “tacit policy of noncompliance”
16 throughout the Department, the Ninth Circuit affirmed decertification. *Id.* at 1121.

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18 The present case is directly analogous to *Campbell*. There is abundant evidence of a FLSA-
19 compliant timekeeping policy that was widely disseminated at the Call Center. At most, Plaintiffs
20 may produce some testimony that individuals chose to violate the timekeeping policy or that
21 variable practices were variably applied. They cannot prove “a tacit policy of noncompliance”
22 throughout the whole Call Center, especially because so many employees, including most of the
23 Plaintiffs, have testified that the actual policy and practices at the Call Center prohibited off-the-
24 clock work. *See also Seward v. IBM*, 2012 U.S. Dist. LEXIS 49688, at *80 (S.D.N.Y. Jan. 20,
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2012) (decertifying collective action of call center agents alleging claims for unpaid boot up time because plaintiffs failed to show uniform and pervasive policy requiring off-the-clock work).

B. Plaintiffs Are Not Similarly Situated with Respect to their Claims of Off-the-Clock Time Spent on Pre-Shift Activities.

Plaintiffs allege they were “required” to boot up their computer, load programs, and confirm their phone was connected *prior to clocking in*, and it took *10-20 minutes* to do these activities. Am. Compl. ¶17. At their depositions, the Named Plaintiffs gave testimony about these activities that was plainly inconsistent with their earlier declarations and the Amended Complaint. Therefore, the Named Plaintiffs may be impeached with inconsistent testimony, unlike most Opt-in Plaintiffs. Generally, the Opt-in Plaintiffs have provided testimony that contradicts the Named Plaintiffs’ declarations and the allegations in the Amended Complaint. However, there is diverse testimony within the group, outliers, and factual differences that relate directly to the dispositive issues of their FLSA claims. These factual differences and individual credibility issues, as detailed below, show that Plaintiffs are not similarly situated with respect to the pre-shift activities.

1. The Named Plaintiffs

In her declaration, Cadena testified she spent about 10-15 minutes per day booting up her computer and opening programs prior to clocking in. ECF No. 32 at 52-54, Cadena Decl. ¶¶6-7. At her deposition, however, she testified it only took about 1-2 minutes to do these tasks. Exhibit J, “Cadena Dep” at 91, 150, 191. During a time period when she opened the facility and also turned on the lights (a unique duty), it only took her 3-4 minutes total (using a laptop) or 5-8 minutes (using a desktop).¹⁰ *Id.* at 95-96, 100. In her declaration, Cadena testified she would open computer

¹⁰ Cadena was not required to turn on the lights, and none of her supervisors knew she was doing so. *Id.* at 93-94, 99-100. In contrast, no Opt-in Plaintiffs testified about turning on lights. And unlike Cadena, the Opt-in Plaintiffs used only desktop computers. Kamaka Dep. at 30.

1 programs before clocking in. Cadena Decl. ¶6. At her deposition, however, she testified (1) she
 2 was instructed to open the timekeeping program and clock in “first thing” prior to doing any work,
 3 and (2) she, in fact, opened up that program to clock in before she opened up the other computer
 4 programs. Cadena Dep. at 77-78, 94, 103-04, 187-90.¹¹

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 6 Gonzales testified inconsistently, too. In his declaration, he testified that, before his
 7 promotion, he spent about 10-20 minutes booting up and opening programs before clocking in,
 8 and it took 5-6 minutes to do the same tasks after his promotion. ECF No. 32 at 56-59, Gonzales
 9 Decl. ¶¶6-7. At his deposition, however, he testified it took less than a minute to boot up and clock
 10 in. Exhibit K, “Gonzales Dep.” at 98-99, 156. The 10-20 minute figure concerned only a subset of
 11 days when he had problems and was a “guesstimation.” *Id.* at 99, 170. In his declaration, he
 12 testified he would open programs before clocking in. Gonzales Decl. ¶6. At his deposition,
 13 however, he testified he was expected to clock in first, which is what he did. Gonzales Dep. at 86.

14 15 16 2. *Opt-In Plaintiffs and Other Employees*

17 Unlike the Named Plaintiffs, most Opt-in Plaintiffs have not submitted dueling,
 18 inconsistent testimony via declaration and deposition. And contrary to the Named Plaintiffs’
 19 declarations, many Opt-in Plaintiffs and other employees testified it only took seconds or a few
 20 minutes to boot up and clock in, though the experiences and times varied from person to person.
 21 *See, e.g.*, Exhibit L, “Sigmon Dep.” at 48, 51, 53 (about 1-2 minutes total to boot up computer, log

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 23 ¹¹ In her declaration, Cadena testified she knew that “all other call center employees” had to clock
 24 in and out the same way she did and that none of these employees were paid for time booting up
 25 and down. Cadena Decl. ¶11. At her deposition, however, Cadena testified (1) she had “no
 26 knowledge” of how other employees clocked in at the start of the day, except for those she could
 27 observe in her area (dispatch, IT, and QA employees), (2) she could not observe call center
 28 representatives because they worked in a different area, (3) at the end of the day, she could not
 observe many people at all because she was one of the first employees to leave, and (4) she was
 not aware of any employees who performed work before clocking in or after clocking out. Cadena
 Dep. at 141-43. She even admitted that Paragraph 11 of her declaration was an uncandid
 exaggeration. *See id.* at 167 (“I may have stretched it with the ‘all’ word.”)).

1 in, and clock in); Exhibit M. “Brandon Cadena Dep.” at 36-38, 43 (“30 seconds to a minute” to
 2 boot up computer if it was off and even less time if it was in sleep mode; 30-60 seconds to open
 3 up programs; “a couple of seconds” to plug in headset); Alford Dep. at 40-42 (computers that were
 4 already on or in sleep mode booted up instantly; other computers took 1-2 minutes, though it
 5 varied; and only took 30 seconds to clock in on the timekeeping program); Exhibit N, “Ortiz Dep.”
 6 at 44-45 (restarted his computer every shift, even though not required, which took about 1-1.5
 7 minutes, and took “a minute or two” to log in and clock in); Dix Dep. at 44-45 (could not estimate
 8 how long it took to boot up and took only a few seconds to log in).¹²

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 11 How quickly it took to boot up and clock in and the regularity or irregularity of those times
 12 depended on many factors that varied based on each Plaintiff’s circumstances, such as their job
 13 position, their shift, whether they used the same computer every day, whether the computer(s) used
 14 were already on, off, or in sleep mode on arrival, the time period they worked, and whether it was
 15 after computers were replaced with faster ones. *See* Alford Dep. at 41-42 (computers were in sleep

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 17 ¹² *See also* Dalupan Dec. ¶16 (“[M]y computer is powered on and waiting at the login screen when
 18 I arrive at work. Once the log in screen comes up, the very first thing I do is clock in using the
 19 computerized time clock. I estimate it takes approximately 30 seconds for me to clock in after I
 20 log on to the computer.”); Gatlin Dec. ¶16 (“If the computer is already turned on, it takes
 21 approximately 1 to 2 seconds for the log-in screen to come up. Once the log-in screen comes up,
 22 the very first thing I do is clock in using the computerized time clock. I estimate it takes less than
 23 60 seconds for me to clock in after I log onto the computer depending on how quickly I type my
 24 login credential to PayCom.”); Godoy Dec. ¶16 (“If the computer is turned off, it takes about 10-
 25 15 seconds for the computer to start and the log-in screen to come up. If the computer is already
 26 turned on, it takes 1 to 2 seconds for the log-in screen to come up...I estimate it takes less than one
 27 minute for me to clock in after I log on to the computer.”); I. Gomez Dec. ¶13 (“20 seconds” to
 28 clock in with PayCom, and “15 seconds to log in using ADP”); J. Gomez Dec. ¶15 (“clocking into
 PayCom only takes me about 20 seconds.”); Guzman Dec. ¶16 (“I estimate it takes less than 5
 seconds for me to clock in after I log on to the computer.”); Howze Dec. ¶17 (“If the computer
 was turned off, it takes about 30 seconds for the computer to start and the log-in screen to come
 up...I estimate it takes less than 5 or 6 seconds for me to clock into Paycom after I log on to the
 computer.”); McCarron Dec. ¶16 (“If the computer is turned off, it takes about 30 seconds for the
 computer to start and the log-in screen to come up...[and] less than 5 seconds for me to clock in
 after I log on to the computer.”); Poole Dec. ¶15; Pryor Dec. ¶15; Reneau Dec. ¶ 16; Roman Dec.
 ¶15; Smith Dec. ¶14; Wilcox Dec. ¶15; Wilkerson Dec. ¶16; Williams Dec. ¶14.

1 mode about 1/3 of the time and booted up instantly but were “off” about 2/3 of the time and took
2 about 1-2 minutes to boot up); Cummings Dep. at 57, 59 (computers were usually on when she
3 arrived, but morning shift got the best computers and spent less time logging in); Mills Dep. at 46,
4 49-50 (her usual computer was on 20% of the time, and was off or in sleep mode about 80% of the
5 time; sometimes, a lead came in early and turned on a lot of computers); Schavers Dep. at 52-56,
6 59-60 (computers were usually off when he arrived, but only took about 3 minutes to boot up;
7 early shift employees, leads, and QA agents got faster computers; and, at some point, half the
8 computers were replaced with newer computers with faster systems, which decreased boot up time;
9 he only had significant computer delays about 2-3 times per month); Saxton Dep. at 27, 61-62 65-
10 66 (had her own assigned computer, but other agents did not; took 2-5 minutes to boot up and “a
11 couple of minutes to get logged in and clocked in”); Brandon Cadena Dep. at 35 (used same
12 computer “basically every day” and it was “quicker” than others); Curley Dep. at 41, 44 (did not
13 have assigned computer, and time needed to log in varied from day to day); Dix Dep. at 40-43, 49-
14 50 (boot up times depended on (a) if computer was shut down the prior shift, which was a personal
15 preference; (b) if you got a new, upgraded computer; (c) which shift you because computers were
16 already on for second shift employees and took less time to boot up); Ortiz Dep. at 28 (while on
17 early shift, had “first dibs” on faster computers and used same computer 95% of time; at some
18 point, policy changed from unassigned to assigned computers); Giraldo Dep. at 31, 33-36 (used
19 same computer every day and was usually off when she arrived; took a couple minutes to start up
20 and clock in; although she opened the timekeeping program first, she would then simultaneously
21 open other programs while clocking in, and amount of time spent varied every day).

Many employees testified they were not required to load programs and set up phones while off the clock, and, to the contrary, were instructed to clock in before doing those tasks.¹³ Likewise, almost all Opt-in Plaintiffs testified they were not required to load programs and set up their phones while off the clock. Alford Dep. at 30, 36-37, 42-43 (never told by supervisor to open other programs before clocking in; did not open other programs or set up phone prior to clocking in); Saxton Dep. at 51, 66 (clocked in before opening other programs and did not have to plug in headset before clocking in); Curley Dep. at 108-10 (would clock in first and then load other programs; in fact, the programs made it impossible to set up the phone until after clocking); Dix Dep. at 45, 47-48 (“first thing” she did was open Paycom and clock in); Sigmon Dep. at 50 (would first clock in and then open up other programs); Ortiz Dep. at 43-44 (“would clock in and then I would open up all my programs”, which is what employees were supposed to do); *cf.* Giraldo Dep. at 33-36, 50-51 (understood she was supposed to clock in before opening other programs, even though that is not what she actually did).

Yet, some Opt-in Plaintiffs testified quite differently about the pre-shift activities. For example, Kenya Mills testified the pre-shift activities took longer than the times stated by other employees and Plaintiffs. She testified it took 10 minutes overall to get clocked in; took about 3

¹³ See Dalupan Dec. ¶12 (“I was also instructed ... I must clock in before I start working, including before I log into any work software programs or log in to begin taking calls for the day”); Godoy Dec. ¶¶12, 16 (“As a team lead, I instruct employees that they must clock in before they start working, including before they log into any work software programs or log in to begin taking calls for the day.”); Gatlin Dec. ¶¶12, 16 (“After I am clocked in, I begin loading work software programs and log into the phone to begin working. I do not conduct any work before I am clocked in.”); Monge Dec. ¶19 (“I and all the other team leads instruct the representatives that once the log in screen comes up, the very first thing they must do is clock in using the computerized time clock.”); Smith Dec. ¶¶10, 14 (“After I clock into PayCom, I begin opening other computer programs I need to work for the day.”); I. Gomez Dec. ¶¶9, 14; J. Gomez Dec. ¶¶9, 15; Guizar Dec. ¶¶9; Guzman Dec. ¶¶12, 16; Howze Dec. ¶17; McCarron Dec. ¶12, 16; Poole Dec. ¶11, 15; Reneau Dec. ¶12, 16; Roman Dec. ¶¶11, 15; Smith Dec. ¶10, 14; Tuilaepa Dec. ¶11, 15; Wilcox Dec. ¶11, 15; Wilkerson Dec. ¶¶11, 15; Williams Dec. ¶¶11, 14.

1 minutes to boot up computers, but they would start up quickly sometimes and slowly other times;
2 it varied and was a “roll of the dice”; and took 3 minutes to clock in with ADP. Mills Dep. at 45.
3 50-53, 55-56. However, her routine in the morning was unique, and delays were caused by her
4 perplexing decision making. She would start at the same computer every day even though she
5 knew the computer did not work and was not assigned to it; then, after her computer of choice
6 inevitably did not boot up, she would restart the whole process at another computer. *Id.* at 46-48,
7 56-57. Asked why she continued to start each day at the dysfunctional computer, Mills stated
8 “that’s where I was most comfortable sitting” and “you have to ask my chakra about that one
9 because it just felt right.” *Id.* at 57-48. She also testified the first program she opened was ADP;
10 however, unlike most other Plaintiffs and employees, she would open other programs at the same
11 time before clocking in.¹⁴ *Id.* at 45, 59. Unlike other Plaintiffs, Mills claims she should also be
12 paid for time spent picking up her headset at a cubbyhole and plugging it in. *Id.* at 74-76. However,
13 no supervisor ever told her she was required to do this before clocking in. *Id.* at 78. Unlike other
14 Plaintiffs, Mills also testified she was required to have work meetings with her leads that lasted
15 15-20 minutes in the morning; this would happen “every day” and was “sometimes” off the clock,
16 but she could not estimate how often. *Id.* at 83-87. Mills’s testimony is sharply distinct from the
17 other Plaintiffs and she is not similarly situated to any of them.

18
19 Another factually divergent Plaintiff, Donna Alford, arrived later than most employees
20 when most computers were already taken. Alford Dep. at 32, 37, 60. As a result, she claims she
21 could find a computer that was on or in sleep mode (that would boot up instantly or in 1-2 minutes)
22 only 1-2 days a week and the other days she got someone from IT to help her find a computer
23 (which took 4-5 minutes). *Id.* at 35, 37-39. She also stated in her interrogatory responses it took
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¹⁴ Compare Schavers Dep. at 60-61 (would open programs one at a time).

1 30-45 minutes to find a computer. *Id.* at 71, 73. She presents unique facts with respect to the
2 lengthy amount of time allegedly spent on pre-shift activities and the regularity of those activities.

3 Unlike other Plaintiffs, Brandon Cadena claimed his supervisors told him he needed to
4 study scripts before clocking in, but later testified he could not recall if that were accurate; he
5 studied the scripts before clocking in but not every day and only until he learned the scripts and he
6 was not sure how long that time period lasted; depending on when he arrived, he sometimes opened
7 up programs before clocking in, though he did not know whether or not his supervisors knew he
8 was doing that. Brandon Cadena Dep. at 26, 28, 34, 38-39, 73-74.

9 Unlike others, Judith Cummings testified she spent 15-30 minutes on pre-shift activities.
10 However, many of the activities were unique to her and she could not remember if they took place
11 before or after she clocked in. *See* Cummings Dep. at 34, 37-38, 46-48, 56, 58-59, 62-63, 65-67
12 (took 15-20 minutes and sometimes as long as 30 minutes to find a computer, find a chair (she was
13 5'2" and most chairs did not fit her), wipe down everything in her cubicle (not a required task),
14 clock in, open programs, and plug in her headset; could not remember if she clocked in first and
15 then opened other programs or vice versa; could not remember what order she was instructed to
16 perform those tasks; could not remember if she plugged in her headset before or after clocking
17 in/out; how long it took to boot up and log in would vary and "depend on the luck of the draw ...
18 as they say in Las Vegas it was a crapshoot;" claims clock-in process alone took at least 5 minutes;
19 could not remember how long it took to open up other programs); *see also* Dix Dep. at 42 (would
20 sometimes go to the break room or bathroom between booting up and clocking in); Saxton Dep.
21 at 44-45, 64, 75-76 (as a supervisor, she helped subordinates with issues if they stopped her before
22 she clocked in; amount of time this took varied from 2-5 minutes).

In sum, the Named Plaintiffs have submitted inconsistent testimony about the pre-shift activities. Most Opt-in Plaintiffs and other employees have testified that time spent on the pre-shift activities was miniscule or on-the-clock, which contradicts the Named Plaintiffs' declarations. Further, there are significant factual variations, deviations, and outliers among the Opt-in Plaintiffs. Considering this evidence, Plaintiffs cannot prove they are similarly situated as to the pre-shift activities. *See Seward*, 2012 U.S. Dist. LEXIS 49688, at *80 (decertifying collective action of call center representatives because there were many factual differences among the plaintiffs).

C. Plaintiffs Are Not Similarly Situated with Respect to their Claims of Off-the-Clock Overtime Spent on Post-Shift Activities.

In the Amended Complaint, Plaintiffs allege they were "required" to close programs, turn off their computers, and wait for them to power down *after clocking out*, and it took 6-8 minutes to perform these activities. Am. Compl. ¶18. The Named Plaintiffs provided inconsistent testimony with respect to these activities and are therefore subject to individualized credibility determinations. Generally, the Opt-in Plaintiffs and other employees provided testimony that contradicts the Named Plaintiffs' declarations and the Amended Complaint. However, there are significant factual distinctions and unique allegations among the Opt-in Plaintiffs. Plaintiffs' inconsistent testimony, their factual differences, and the individual credibility issues needed to resolve their claims demonstrate that they are not similarly situated with respect to the post-shift activities.

1. Named Plaintiffs

In her declaration, Cadena testified she spent about six minutes closing programs and shutting down her computer after clocking out. ECF No. 32 at 52-54, Cadena Decl. ¶¶8-9. At her deposition, however, Cadena testified it only took 1-2 minutes to shut down (using a laptop) or 2-4 minutes (using a desktop). Cadena Dep. at 123-24, 150-51. Further, Cadena testified (1) she was

1 never told to clock out before closing other programs, and (2) she closed out all programs *before*
2 clocking out. *Id.* at 113, 123-24, 193.

3 In his declaration, Gonzales testified he spent 5-8 minutes closing programs and shutting
4 down his computer after clocking out. ECF No. 32 at 56-59, Gonzales Decl. ¶¶8-9. He also testified
5 he was told to wait for the computer to shut down before leaving. Gonzales Decl. ¶8. At his
6 deposition, however, he testified that no one ever told him to wait for his computer to shut down.
7 Gonzales Dep. at 109, 157. Also contradicting his declaration, he testified that he closed out the
8 programs *before* clocking out. *Id.* at 107-08. He testified that clocking out was supposed to be the
9 last thing he did on the computer. *Id.* at 108. Further, he testified it only took 30-40 seconds to shut
10 down, in contrast to the 5-8 minutes stated in his declaration. *Id.* at 110. He testified that it would
11 take longer than 30-40 seconds rarely or, as he put it, “once in a blue moon.” *Id.* Also contradicting
12 his declaration, at his deposition stated (1) he did not know the routines or sequences of how other
13 employees booted up and down, (2) other employees did not wait for the computer to fully shut
14 down before leaving and, in fact, he “was the only one that actually sat there and watched it all
15 shut down and register before [he] left.” *Compare id.* at 122-23, 161-62, with Gonzales Decl. ¶11.

19 2. *Opt-in Plaintiffs and Other Employees*

20 Unlike the Named Plaintiffs, most Opt-in Plaintiffs have not submitted inconsistent
21 testimony via declaration and deposition. And contrary to the Named Plaintiffs’ declarations, most
22 Opt-in Plaintiffs and other employees testified they were not required to perform any of the alleged
23 post-shift activities while off the clock and the amount of time needed to perform these activities
24 was miniscule. However, as with the pre-shift activities, some Opt-in Plaintiffs had unusual post-
25 shift routines and provided distinct testimony on key factual issues.
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Most Opt-in Plaintiffs and other employees testified they shut down programs and turned off their phone while on the clock, were not required to wait for the computer to shut down or perform other work activities while off the clock, and that it took virtually no time to do these activities. *See, e.g.*, Alford Dep. at 44-46, 69 (turned off phone and closed programs before clocking out; only took a few seconds to log off; was not required to do any work after clocking out; and did not wait for computer to shut down); Cummings Dep. at 71, 73-74 (clocking out was typically the last thing she did before leaving; never did work after clocking out; would only take “a second or two” to turn off the computer); Schavers Dep. at 76-78 (never did work after clocking out; closed programs before clocking out; took only a “few seconds” to turn off computer); Brandon Cadena Dep. at 46-47, 67 (closed all programs before he clocked out; took “a few seconds” to turn off computer; no one ever told him to turn off the computer; some employees did not turn off the computers and it was a “person-to-person” thing; does not contend that he is owed any wages for post-shift time); Curley Dep. at 57-59, 110 (would close out programs, then clock out, then shut down computer and leave; it usually only took a few seconds to a minute to shut down); Dix Dep. at 52-53 (would close out all programs before clocking out and did not work after clocking out); Sigmon Dep. at 56-57 (would close out programs prior to clocking out; then, would push power button and leave, which took a few seconds; would not wait for computer to shut down); Ortiz Dep. at 43, 46 (took only 10-15 seconds to clock out and log out; employees were not required to shut down their computers and most did not).¹⁵

¹⁵ *See also* Poole Dec. ¶16 (“I leave my desk the second I clock out of Paycom.”); Gatlin Dec. ¶17 (“[T]he last thing I do is clock out. I logoff the computer and ... I do not remain while the computer logs off. No one at Customer Connexx has ever told me I need to wait to ensure the computer properly logs off.”); Smith Dec. ¶15 (“I turn the power off on my computer every day...which usually takes less than one minute. This is my habit no one at [Connexx] has ever told me I need to wait to ensure the computer properly shuts down.”); Godoy Dec. ¶17 (“[T]he last thing I do is clock out...I do not perform any work after I clock out for the day. No one at [Connexx] has ever

1 Yet, some Opt-in Plaintiffs testified to dissimilar experiences, routines, and amounts of
 2 time due to individual circumstances. *See* Cummings Dep. at 29 (not all employees closed
 3 programs and shut down their computers at the end of day); Dix at 130 (some supervisors would
 4 ask employees to shut down computers; other supervisors told employees to leave it on); Dix Dep.
 5 at 133-34, 136-37 (would take 10-15 minutes for computer to shut down but this changed when
 6 she was assigned to a different team with upgraded computers that only took 1-3 minutes to shut
 7 down); Saxton Dep. at 51, 67-68 (closed out of programs before clocking out; waited for her
 8 computer to shut down, about a minute, only because she was a supervisor and there was
 9 confidential information on it); Curley Dep. at 74 (not all employees shut down their computers at
 10 end of day); Giraldo Dep. at 38-45, 51 (was expected to close programs and then clock out; she
 11 would clock out and then close programs at the same time, which did not cause delays; waited for
 12 computer to shut down which took about two minutes on average; dropped off stuff in cubby while
 13 it shut down; came back and to wipe computer down; whole process took 5-10 minutes).

14 As another example of irregular post-shift routines, Kenya Mills testified she would close
 15 the programs after clocking out sometimes and before clocking out other times. Mills Dep. at 66-
 16 67. She could not estimate how often she closed the other programs while off the clock. *Id.* at 67-
 17 68. She stated it ranged from two to “maybe” 10 or 15 minutes, but she had difficulties estimating
 18 because it varied so much. *Id.* at 68. She testified it took either 30 seconds or 2-3 minutes to shut
 19 down the computer after clocking out. *Id.* at 70-71. She testified that her supervisors never told her
 20 to close the programs while off the clock, but she thought they were aware of this because of her
 21 general complaint that her computer had problems. *Id.* at 72. Unlike most Plaintiffs, Mills
 22 told me I need to wait to ensure the computer properly shuts down, and I am not aware of anyone
 23 being told this.”); I. Gomez Dec. ¶15; J. Gomez Dec. ¶16; Guizar Dec. ¶16; Guzman Dec. ¶17;
 24 Howze Dec. ¶18; McCarron Dec. ¶17; Monge Dec. ¶¶20, 22; Dalupan Dec. ¶17; Pryor Dec. ¶16;
 25 Reneau Dec. ¶17; Roman Dec. ¶16; Tuilaepa Dec. ¶16; Wilcox Dec. ¶16; Williams Dec. ¶15.).

1 unplugged and put away her headset in a cubbyhole; this “sometimes” happened after clocking
 2 out, but she could not estimate how often. *Id.* at 79-80. She did not have a routine or “regular order”
 3 of tasks at the end of her day. *Id.* at 80. Unlike other Plaintiffs, she also testified that she was
 4 required to have meetings with her leads that would last 10-15 minutes at the end of the day; this
 5 would happen “every day” and was “sometimes” off the clock, but she could not estimate how
 6 often.¹⁶ *Id.* at 80-87. Mills’s testimony is unique, and she is not similarly situated to other Plaintiffs.

8 Other Plaintiffs also had a unique claims about post-shift time. *See* Cummings Dep. at 38-
 9 40, 94, 96 (claims she was not paid for time spent on phone calls that ran late at the end of the
 10 day); Curley Dep. at 59, 73, 98-99 (claims she had to spend time making sure that everyone else’s
 11 computers were shut off after she clocked out and turned off the lights as a manager, although she
 12 was paid for some of this time); Saxton Dep. at 39, 72, 74 (claims she helped subordinates who
 13 stopped her after she clocked out; amount of time it took varied from 2-7 minutes).

15 In sum, the Named Plaintiffs have submitted inconsistent testimony about the post-shift
 16 activities. Most of Opt-in Plaintiffs and other employees have contradicted the Named Plaintiffs’
 17 declarations and testified that time spent on these activities was on-the-clock and miniscule, though
 18 there are significant factual distinctions among them. Considering this evidence, Plaintiffs cannot
 19 prove they are similarly situated with respect to the post-shift activities.

21 **D. Plaintiffs Are Not Similarly Situated Because of the Process to Correct Time Entries.**

22 Employees at the Call Center can review their recorded hours worked in the timekeeping
 23 system, receive emails reminding them to check their time for accuracy, and are instructed to notify
 24 their supervisors if there are any inaccurate time entries so that adjustments can be made.¹⁷ Further,

27 ¹⁶ *But cf.* Cummings Dep. at 68 (did not recall off-the-clock meetings); Schavers Dep. at 79 (same).

28 ¹⁷ Kamaka Dec. ¶11; Alford Dep. at 54, 57; Exhibit R, Sample Email Reminders; Guizar Dec. ¶¶7-
 10, 23 (“In fact, we are reminded weekly to verify all our hours in the system so that we are

1 if employees had delays logging in or clocking in, they notify their supervisors, who will adjust
 2 their time so that they are paid for that time.¹⁸ Indeed, many Plaintiffs confirmed they used various
 3 procedures to correct their time entries if they were delayed logging in or had computer issues,
 4 though their testimony varied. *See* Brandon Cadena Dep. at 48-49, 53 (could review recorded time
 5 on Paycom; would email supervisor or use punch claim form to adjust time if needed; would check
 6 behind the supervisor and confirm it had been corrected); Cummings Dep. at 61-62, 76, 93-94
 7 (could review recorded hours on ADP and Paycom; would use punch claim forms or ask IT staff
 8 member to make adjustments; the IT staff member “was great” and would fix her time; would
 9 check and make sure her time had been corrected); Curley Dep. at 15, 42, 45, 54-55, 97-98, 124-
 10 25, 144 (would email supervisors if her check were short; would submit punch claim form to adjust

11 properly compensated for all time worked.”); Dalupan Dec. ¶¶10, 13; Gatlin Dec. ¶¶10-13; Godoy
 12 Dec. ¶¶10-12; I. Gomez Dec. ¶¶7-10; J. Gomez Dec. ¶¶7-8; Guzman Dec. ¶¶10-13; Howze Dec.
 13 ¶¶9-13; McCarron Dec. ¶¶10-13; Monge Dec. ¶¶11-15; Poole Dec. ¶¶9-12; Pryor Dec. ¶¶9-12;
 14 Reneau Dec. ¶¶10-13; Roman Dec. ¶¶9-12; Smith Dec. ¶¶9-11; Tuilaepa Dec. ¶¶9-12; Wilcox
 15 Dec. ¶¶9-12; Wilkerson Dec. ¶¶9-12; Williams Dec. ¶¶9-10.

16 ¹⁸ Kamaka Dec. ¶10; Dalupan Dec. ¶13, 19 (supervisors explained she was supposed to submit a
 17 form if she was delayed clocking in or out, and she would use this process if she had technical
 18 issues or computer crashed); J. Gomez Dec. ¶¶7, 14 (“When the computers were slow or it took
 19 me more than a minute to log on I let a lead know and they gave me a punch claim.”); Howze Dec.
 20 ¶19 (“Seldom, there will be technical problems where the systems are down and IT is contacted. I
 21 only recall one occasion of this happening, and when it happened, I told my supervisor or lead my
 22 correct time, who filled out a Punch Claim form, and my time was corrected.”); McCarron Dec.
 23 ¶19 (“I have had technical issues with the computer booting up less than five times...It may delay
 24 me from clocking in. If that occurs, I submitted a Missed Punch Form to Ms. Smith.”); Monge
 25 Dec. ¶22 (“If there are technical problems or the system is down and an employee is prevented
 26 from clocking into Paycom, I ensure they fill out a Punch Claim form.”); Wilkerson Dec. ¶20 (“If
 27 we have trouble with our computers or clocking in for whatever reason then we just have to tell
 28 our supervisor and complete a Punch Claim form to ensure that we are properly paid. ... We have
 an opportunity to verify our time entries before payroll is run...”); Williams Dec. ¶16 (“When I
 first started I locked myself out of PayCom because I tried my password too many times but when
 that happened I told my manager and completed a Punch Claim Form.”); Gatlin Dec. ¶13; Godoy
 Dec. ¶13; I. Gomez Dec. ¶10; Guizar Dec. ¶¶10, 18; Guzman Dec. ¶13; Howze Dec. ¶¶10, 13;
 McCarron Dec. ¶13; Monge Dec. ¶12; Poole Dec. ¶¶12, 17; Pryor Dec. ¶¶9, 12; Reneau Dec. ¶13;
 Roman Dec. ¶12; Smith Dec. ¶¶9, 11, 16; Tuilaepa Dec. ¶¶12, 17; Wilcox Dec. ¶12, 17-18.

1 time if there were delays booting up or logging in; her time was always fixed and she got paid for
 2 that time); Dix Dep. at 53-54 (if delays booting up or clocking in, would submit a punch claim
 3 form and her time would be corrected); Gonzales Dep. at 66-73, 86-87, 95-97, 110-11, 170
 4 (reported whenever he had problems booting up or booting down, such as when it took him longer
 5 than usual, and requested to have his time adjusted; in some instances, his time was adjusted
 6 correctly, and in other instances, he did not know whether his time was adjusted); Schavers Dep.
 7 at 28-29, 40, 50, 82, 86-87 (could review his recorded time via Paycom; would use email, Five9
 8 messaging system, or punch claim forms to ask IT staff member or leads to correct his time if it
 9 took him a long time to log in); Mills Dep. at 29-30, 56, 87-94 (could review time on ADP and
 10 Paycom; could email supervisors or use form to correct time entries; would notify her supervisor
 11 and request for her time to be adjusted if computer was slow and it took more than 5 minutes to
 12 clock in or if similar problems at end of her shift; supervisors encouraged call center employees to
 13 review and correct their time so they would be paid properly¹⁹); Alford Dep. at 46-50 (would
 14 request time corrections from a lead or IT staff member if she had problems logging in; also used
 15 punch claim forms); Saxton Dep. at 77-79, 86 (could review recorded time in system; would use
 16 punch claim log or email supervisor to correct time if there was an issue with computer or
 17 prevented from clocking in on time); Ortiz Dep. at 41-42 (was instructed to contact supervisor if
 18 he missed a punch or unable to log in promptly).²⁰

22
 23 Considering this voluminous testimony on the existence of multiple avenues to correct time
 24 entries and get paid correctly in the event of computer delays, no reasonable trier of fact could

26 ¹⁹ In her discovery responses, Mills claimed that supervisors did not correct her hours; at her
 27 deposition, she testified she did not know whether they corrected her hours. Mills Dep. at 134-35.

28 ²⁰ *But see* Giraldo Dep. at 36-38, 63-64 (knew there was a process to fill out a form and adjust time
 if computer was not working or unable to clock in; but, unlike others, she was not aware she could
 use this process for computer delays).

1 conclude that there was an unwritten, Department-wide policy that prevents employees at the Call
 2 Center from getting paid for computer delays associated with booting up and booting down. As in
 3 the *Campbell* case, Plaintiffs cannot prove a “uniform policy.” At most, they might establish
 4 “variable practices variably applied.” 903 F.3d at 1120-21. Consequently, they are not similarly
 5 situated, and the collective action must be decertified. *Id.*

7 **E. Other Individualized Issues**

8 *1. Some Plaintiffs Were Responsible for Enforcing the Timekeeping Policy.*

9 Most Plaintiffs were call center agents, but some were supervisors and responsible for
 10 implementing Connexx’s attendance and timekeeping policies. Rossalind Saxton supervised QA
 11 agents, dispatch agents, and customer service agents. Saxton Dep. at 12-14, 17-18. Her duties
 12 included supervising and training agents with respect to attendance and timekeeping, including
 13 Connexx’s policy against working off the clock. *Id.* at 19-20, 23, 25-26, 99, 108. She occasionally
 14 made corrections in the timekeeping system when employees submitted punch claim forms. *Id.* at
 15 24. She was also responsible for creating training on boot-up and log-in procedures for Call Center
 16 employees. Kamaka Dep at 19-20. Kenya Mills was a lead and supervised agents during part of
 17 her employment. Mills Dep. at 11, 15. Her duties included making sure that agents were clocked
 18 in while working. *Id.* at 16-17. Danielle Curley and Richard Ortiz were also leads for a time. Curley
 19 Dep. at 36-37; Ortiz Dep. at 25. Many Plaintiffs testified they would report to their leads when
 20 they needed to adjust their time because of a delayed log in or other issues. *See supra* Section IV.D.
 21 Cariene Cadena, a supervisor herself, was supervised by Saxton and would ask Saxton to correct
 22 her time if there was a delayed clock in. Cariene Cadena Dep. at 41-42, 62-64.

26 Supervisors and subordinates are not similarly situated in this case. Collective action
 27 certification is inappropriate where some members of the collective action supervised other
 28

members and were responsible for ensuring that they were paid correctly under the FLSA or company policies. *See Bentley v. Cty. of L.A.*, 2009 U.S. Dist. LEXIS 135766, at *7-8 (C.D. Cal. Sep. 15, 2009); *Ellerd v. Cty. of L.A.*, 2009 U.S. Dist. LEXIS 36865, at *13-14 (C.D. Cal. Apr. 9, 2009); *White v. Osmose, Inc.*, 204 F. Supp. 2d 1309, 1315 (M.D. Ala. 2002).

2. *Some Plaintiffs Worked Less Than Forty Hours Per Week.*

If Plaintiffs worked less than 40 hours in a particular week, then Defendants have no FLSA liability for those weeks. *See Sargent v. HG Staffing, LLC*, 171 F. Supp. 3d 1063, 1077 (D. Nev. 2016). Judith Cummings only worked part-time, which was 24-30 hours per week. Cummings Dep. at 42-43. Brandon Cadena only worked about 38 hours per week. Brandon Cadena Dep. at 30, 61, 64-65. Even if they worked off-the-clock 20 minutes per day for five days (100 extra minutes per week), neither would exceed 40 hours per week. Other employees testified they worked 8 hours per day and 5 days per week, in which case unpaid, compensable off-the-clock time would exceed 40 hours per week and qualify for overtime. However, this type of testimony depends on individual evidence. For example, the Named Plaintiffs assert they worked at least 5 shifts per week and 8 hours per day, Am. Compl. ¶16, but a week-by-week review of Cariene Cadena's time records show she worked 5 days per week only 55% of her workweeks. *See* Exhibit O, Stuckwisch Report ¶¶55-58. In contrast, Andrew Gonzales worked 5 days per week 76% of workweeks. *Id.* Determining the veracity of each Plaintiff's testimony regarding their schedule and whether they exceeded 40 hours per week will require week-by-week review of each Plaintiff's time records and the outcomes will vary from person to person and from week to week. Thus, Plaintiffs are not similarly situated with respect the baseline issue of whether they even incurred overtime.

V. CONCLUSION

For all the above reasons, Defendants request that the Court grant this Motion, decertify

1 the collective action, and dismiss without prejudice the FLSA claims of the Opt-in Plaintiffs.

2 Submitted this 27th day of October, 2020.

3
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CERTIFICATE OF SERVICE

I certify that on October 27, 2020 a copy of the foregoing was filed with the Court's CM/ECF system, which electronically sends notice to the following counsel of record:

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4849-7480-7760, v. 1